Kok Swee Chin v General Factoring & Credit Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D3–22–456 OF 2000
ZULKEFLI J
23 MARCH 2004

Contract — Loan — Interest payments — Late payment charges — Whether interest a penalty interest or genuine pre-estimate of loss — Whether plaintiff estopped from challenging liability to pay interest — Contracts Act 1950 s 27

Moneylenders — Interest — Excessive interest — Whether compound interest was excessive, harsh and unconscionable — Whether defendant entitled to compound interest — Whether compound interest and default interest a penalty interest

Moneylenders — Unlicensed moneylenders — Whether loan from defendant to plaintiff were unlicensed moneylending transactions

The plaintiff secured a loan from the defendant to part finance the purchase of a condominium unit. Both parties entered into a loan agreement cum assignment. The interest charged by the defendants for the loan was 14%pa compound interest on monthly rests on all moneys advanced or released, and a default interest or late payment interest at 18%pa compound interest in addition to the amount of each instalment.

The plaintiff in her suit claimed the following: (a) that the defendant did not have a moneylending license; (b) even if the defendant had the license, it was not entitled to charge a compound interest because it was excessive, harsh and unconscionable; and (c) the defendant was not entitled to the compound interest and default interest because it is penalty interest. On the other hand, the defendant's defence was as follows: (a) that it was awarded an exemption by the Ministry of Housing and Local Government under s 2(e) of the Moneylenders Act 1951 (old Act); (b) both contracting parties were agreeable to the interest rates contained in the loan agreement; and (c) the plaintiff should be estopped from challenging the validity of the agreement, denying obligation to pay the agreed interest, unilaterally changing the agreed interest rate and claiming for a refund of RM260,940.57 as well as seeking relief.

Held, dismissing the plaintiff's application with costs:

(1) The defendant is a moneylender recognised by the Government of Malaysia and is also a moneylender exempted from the Moneylenders Act 1951 during the exemption period (24 May 1983 to 22 May 1991). Since the agreement was executed during the exemption period, the loan agreement was valid, binding and enforceable (see paras 5 and 6).

(2) From 23 May 1991 to 31 May 1999, the defendants were not prohibited from collecting repayment of the loan and payment of agreed interest and late payment charges in respect of loan agreements executed during the exemption period. In the absence of evidence by the plaintiff to the effect that the defendant is prohibited from the

business of collection beyond the exemption period, the plaintiff's allegation failed (see paras 12 and 13).

(3) Since illegality was never pleaded in the statement of claim, it was not considered and accepted. However, mistake of fact and compulsion which was pleaded failed because there was no evidence to substantiate it (see para 15).

(4) Pursuant to the old s 2(e) of the Act (now s 2A), the defendant is not a licensed moneylender but a corporate body exempted by the Minister and was therefore not bound by the Act and could contract on the interest rates of 14%pa so long as it was mutually agreed by both contracting parties. Hence, the plaintiff and the defendant were contractually bound and the defendants should be paid the interest at the rate of 14%pa and default interest at the rate of 18%pa as agreed in the loan agreement (see para 16).

(5) If interest was agreed to be of yearly or monthly rests, then interest was chargeable on the outstanding sum to be computed on compound interest basis. The defendant was entitled to do so under the agreement which was not considered to be excessive, harsh or unconscionable (see para 18).

(6) The onus of showing that a specified sum was a penalty lay upon the party who was sued for his recovery. The plaintiff failed to discharge the burden of proving that the late payment charge at 18%pa was a penalty. Even if the late payment charge was a penalty, it should not be a ground to nullify the agreement. The plaintiff simply could not rely on s 75 of the Contracts Act 1950 and allege that the late payment charge was a penalty and hence was irrevocable. As such, in this situation the late payment charge was a liquidated damage which represented a genuine pre-estimate of the defendant's loss for breach of contract by the plaintiff. It was by no means exorbitant, harsh or unconscionable but served as a 'reasonable compensation' to the defendant as per illustration (d) of s 75 of the Contracts Act (see paras 20 and 23).

(7) The plaintiff had been a voluntary party to the agreement and been repaying the loan and payment of interest as well as the late payment charges for almost 12 years. Thus, the plaintiff should be treated as having waived her rights and be estopped from challenging her liability to pay the agreed interest and late payment charges; challenging the validity of the agreement; requesting for a refund for a sum of RM260,940.57 and other reliefs from the defendant (see para 24).

[Bahasa Malaysia summary

Plaintif mendapat pinjaman daripada defendan untuk membiayai sebahagian daripada pembelian sebuah unit kondominium. Kedua-dua pihak memasuki perjanjian pinjaman dan serahanhak. Pihak defendan mengenakan faedah kompaun sebanyak 14% setahun ke atas pinjaman yang diberikan setiap bulan berasaskan semua wang yang dipinjam atau

dikeluarkan serta faedah kompaun sebanyak 18% setahun untuk pembayaran lewat sebagai tambahan kepada setiap ansuran. A

Plaintif dalam guaman sivilnya menuntut berikut: (a) bahawa defendan tidak mempunyai lesen pemberipinjam wang; (b) walaupun defendan mempunyai lesen tersebut, ia tidak layak untuk mengenakan faedah kompaun sebab amaun tersebut adalah berlebih-lebihan, bertindak keras B and tidak munasabah; serta (c) defendan tidak layak terhadap faedah kompaun dan faedah termungkir kerana ia adalah faedah penalti. Berikut adalah pembelaan defendan pula: (a) bahawa defendan diberikan pengecualian daripada Kementerian Perumahan dan Kerajaan Tempatan dibawah s 2(e) Akta Pemberpinjam Wang 1951 (Akta lama); (b) kedua-dua pihak yang berkontrak bersetuju dengan kadar faedah yang terkandung C dalam perjanjian pinjaman; serta (3) plaintif harus diestop daripada mencabar kesahan perjanjian tersebut, menafikan obligasi untuk membayar faedah dalam perjanjian, menukar kadar faedah yang dipersetujui secara satu pihak, menuntut bayaran balik sebanyak RM260,940.57 serta relief.

D

Diputuskan, menolak permohonan plaintif dengan kos:

(1) Defendan merupakan pemberipinjam wang yang disahkan oleh Kerajaan Malaysia serta pemberipinjam wang yang telah diberi pengecualian oleh Akta Pemberipinjam Wang 1951 semasa tempoh pengecualian (24 Mei 1983 ke 22 Mei 1991). Memandangkan E perjanjian itu disempurnakan semasa tempoh pengecualian, perjanjian pinjaman adalan mengikat dan boleh dikuatkuasakan (lihat perenggan 5 dan 6).

(2) Daripada 23 Mei 1991 hingga 31 Mei 1999, pihak defendan tidak dilarang daripada menuntut bayaran balik pinjaman dan bayaran faedah yang dipersetujukan serta pembayaran lewat berkait dengan F perjanjian pinjaman yang dilaksanakan semasa tempoh pengecualian. Dengan ketiadaan keterangan oleh plaintif yang menunjukan defendan dilarang menuntut bayaran balik selepas tempoh pengecualian, pengataan plaintif gagal (lihat perenggan 12 dan 13).

(3) Oleh kerana kepenyalahan undang-undang tidak dinyatakan dalam G penyataan tuntutan, ia tidak dipertimbangkan dan di terima. Walau bagaimanapun, kesilapan fakta dan bertindak secara paksa yang diplidkan gagal kerana tidak disokong oleh sebarang keterangan (lihat perenggan 15).

(4) Menurut s 2(e) Akta yang lama (sekarang s 2A), pihak defendan H bukan seorang pemberipinjam wang yang berlesen tetapi perbadanan korporat yang dikecualikan oleh Menteri dan tidak diikat oleh Akta tersebut dan boleh berkontrak dengan kadar faedah 14% setahun asalkan kedua-dua pihak yang berkontrak bersetuju. Oleh itu, plaintif dan defendan adalah terikat secara kontrak dan defendan harus I dibayar pada kadar faedah sebanyak 14% setahun serta faedah termungkir sebanyak 18% setahun seperti yang dinyatakan dalam perjanjian tersebut (lihat perenggan 16).

(5) Jika kadar faedah dipersetujui dibayar secara baki tahunan atau baki bulanan, kadar faedah yang dikenakan terhadap hutang yang belum dijelaskan akan dikira secara faedah kompaun. Defendan berhak membuat demikian di bawah perjanjian tersebut di mana ini tidak diambilkira sebagai berlebih-lebihan, bertindak keras atau tidak munasabah (lihat perenggan 18).

(6) Beban untuk menunjukkan jumlah tertentu adalah penalti berada pada pihak yang mendakwa untuk mendapat kembali bayaran yang dibuat. Plaintif gagal melepaskan beban membukti bahawa pembayaran lewat yang dikenakan pada kadar 18% setahun adalah penalti. Walaupun pembayaran lewat adalah penalti, ia tidak merupakan alasan untuk membatalkan perjanjian tersebut. Plaintif tidak boleh bergantung kepada s 75 Akta Kontrak 1950 dan seterusnya mengata bahawa pembayaran lewat adalah penalti dan ini tidak dapat dibatalkan. Di dalam keadaan ini, pembayaran lewat tersebut dianggap sebagai ganti rugi jumlah tertentu yang mewakili pra anggaran kerugian yang tulen yang akan dialami oleh defendan kerana kemungkiran kontrak oleh plaintif. Kadar faedah yang dikenakan tidak boleh dianggap sebagai berlebih-lebihan, tindakan defendan terlalu keras ataupun tidak munasabah tetapi adalah pampasan yang wajar kepada defendan seperti di illustrasi (d) s 75 Akta Kontrak (lihat perenggan 20 dan 23).

(7) Plaintif secara sukarela menjadi pihak kepada perjanjian tersebut dan telah membayar hutang dan faedah serta pembayaran lewat selama 12 tahun. Maka, patut dianggap bahawa beliau telah menepikan hak-haknya dan harus diestop daripada mencabar liabiliti untuk membayar faedah dan pembayaran lewat yang dipersetujui; mencabar kesahan perjanjian tersebut; menuntut bayaran balik untuk jumlah sebanyak RM260,940.57, dan relif-relif lain daripada defendan (lihat perenggan 24).]

Notes

For cases on interest payments on loans, see 3(2) *Mallal's Digest* (4th Ed 2003 Reissue) para 3817.

For cases on excessive interest by moneylenders, see 10 *Mallal's Digest* (4th Ed 2002 Reissue) paras 477-478.

For cases on whether loans from defendant to plaintiff were unlicensed moneylending transactions, see 10 *Mallal's Digest* (4th Ed 2002 Reissue) para 575.

Cases referred to

Bumiputra Merchant Bankers Bhd v Meng Kuang Properties Bhd [1991] 1 CLJ 718 (refd)

Chellapah Rasadurai v Selvadurai [1971] 2 MLJ 170 (refd)

Realvest Properties Sdn Bhd v The Co-operative Central Bank Ltd (Under Receivership) [1996] 3 CLJ 823 (refd)

Roboohone Facilities Ltd v Blank [1996] 1 WLR 1428 (refd)

Sadhu Singh v Sellathurai [1955] MLJ 117 (refd) A
Sundar Koer v Raj Sham Kishen (1906) 34 IA 9 (refd)
Trengganu State Economic Development Corporation v Nadefinco Ltd [1982] 1 MLJ 365 (refd)

Legislation referred to B

Contracts Act 1950 s 75 illus (d)
Moneylenders Act 1951 ss 2, 2(e), 3, 5, 15, 21, 22(1)
Moneylenders Ordinance 1951

SK Sivam (Shakila with him) (PG Lim & Co) for the plaintiff.
SY Lai (Jaya Couri with him) (SY Lai & Associates) for the defendant. C

Zulkefli J:

PLAINTIFF'S CLAIM

[1] The following are the relevant facts in relation to the plaintiff's claim: D

(1) the plaintiff took a loan of RM252,000 from the defendant to part finance the purchase of a condominium unit known as GCB Condominium, Jalan Ampang, Kuala Lumpur;

(2) the purchase price of the condominium unit was RM315,000. The plaintiff paid her own money of RM63,000 and borrowed a balance of RM252,000 from the defendant; E

(3) the plaintiff entered into a Loan Agreement Cum Assignment ('the Agreement') dated 9 May 1984 with the defendant whereby as security for the said loan she assigned the said condominium to the defendant subject to the terms and conditions contained in the Loan Agreement Cum Assignment; F

(4) the interest charged by the defendants for the said loan under the said agreement were:

(a) 14%pa compound interest on monthly rests on all moneys advanced or released; G

(b) default interest or late payment interest at 18%pa compound interest in addition to (a) on the amount of each instalment;

(5) as at 30 June 1999, the state of the plaintiff's account with the defendant is as stated hereunder according to defendant's letter dated 22 May 1999: H

	RM
Loan Principal	252,000.00
(a) Interest charged	511,510.11 I
(b) Late payment charges	225,179.02
	988,689.13

A Less

(c) Repayment made	870.617.56
Outstanding balance as at 30 June 1999 as per contention of defendant	118,071.57

B (6) the plaintiff contends that the defendant does not have moneylending licence, and even if they have, which is not admitted, the defendant is not entitled to charge compound interest at 14%pa and late payment charges at 18%pa on compound interest basis;

(7) the plaintiff contends further that the said rates of interest and each of them and charging the same on compound interest basis is excessive, C harsh and unconscionable. The compound late payment interest charged is also a penalty;

(8) the plaintiff asserts further that the defendant is not entitled to charge compound interest and compound default interest or penalty interest;

D (9) the plaintiff contends that she was charged interest and late payment interest from 1 August 1985 to 31 May 1997. Late payment interest was charged even though plaintiff had regularly paid the instalments during certain periods from July 1987 onwards.

DEFENCE

E

[2] The defence of the defendant, *inter alia*, is as follows:

(1) the Moneylenders Act 1951 ('the Act') does not apply to the defendant;

(2) the defendant was given exemption by the Ministry of Housing and F Local Government under the old s 2(e) of the Act (now s 2A) in the three letters from the Ministry to the defendant dated 26 May 1983 commencing from 24 May 1983 to 23 May 1986, dated 27 October 1986 commencing from 23 May 1986 to 22 May 1989 and finally dated 5 June 1989 commencing from 23 May 1989 to 22 May 1991;

G (3) that all agreed interest rates and late payment charges contained in the Loan Agreement Cum Assignment dated 9 May 1984 ('the Agreement') are agreeable by both contracting parties viz the defendant as lender and the plaintiff as borrower;

(4) that the plaintiff had, by paying the agreed instalments from 31 July H 1987 to 31 May 1999; is now estopped from:

(a) challenging the validity of the Agreement;

(b) denying the plaintiff's obligation to pay for the agreed interest and agreed late payment charges;

(c) unilaterally changing the agreed interest rate from 14%pa with monthly rests to simple interest at 12%pa;

(d) unilaterally changing the agreed interest rate on late payment charges compounded at 18%pa to simple interest at 4%pa;

(e) claiming for a refund of RM260,940.57 from the defendant; and

(f) seeking for all the reliefs as stated in paras 15(a) to (j) of the statement of claim dated 10 March 2000.

DECISION OF THE COURT

[3] Having studied the documentary evidence tendered by both the plaintiff and the defendant and the evidence of witnesses called by both parties, it is my decision that the plaintiff has failed on the balance of probabilities to prove her case in respect of the claim against the defendant. The plaintiff's claim is thereby dismissed with cost.

[4] The following are my reasons in dismissing the plaintiff's claim.

Whether the Moneylenders' Ordinance 1951 ('The Act') applies to the defendant

[5] It is my view that the provision of the Act does not apply to the defendant in the present case. The defendant is a moneylender recognized by the Government (Ministry of Housing and Local Government). The old s 2(e) of the Act provides as follows with regard to the meaning of the term 'moneylenders':

> 'moneylenders' includes every person whose business is that of moneylending ... but does not include ... any body corporate or society for the time being exempted by the Minister ('Minister' means 'the Minister charged with responsibility for the control of moneylenders') by notification published in the Gazette from the provisions of this Ordinance (Moneylenders Act 1951).

[6] As the said Agreement was executed on 9 May 1984 which was during the exemption period, the Agreement is hence valid binding and enforceable. It is my finding that by virtue of the said three letters as shown at pp 1, 2 and 3 of the Agreed Bundle of Documents (AB1), the defendant is a moneylender recognized by the Government of Malaysia and also a moneylender exempted from the Act during the exemption period.

[7] The learned counsel for the plaintiff contended that in the present case the defendant has admitted to lending money and being in the business of lending and also admitted that it has no license under the Act. This being the case the provision of s 15 of the Act is applicable. Section 15 of the Act provides as follows:

> No contract for the repayment of money lent after the coming into force of this Act by an unlicensed moneylender shall be enforceable.

[8] For the plaintiff the two cases of *Chellappah Rasadurai v Selvadurai* [1971] 2 MLJ 170 FC and *Sadhu Singh v Sellathurai* [1955] MLJ 117 were cited to show the provision of the said s 15 of the Act was in issue. The court therein held that the plaintiff in that two cases were unlicensed moneylenders and as such the claim was dismissed.

[9] With respect I could not agree with the above contention of the plaintiff. The facts in the *Chellappah* and *Sadhu Singh* are completely different from that of this present case. In that two said cases the courts had

ruled that the lenders had on previous occasions lent money to the borrowers in consideration of a larger sums being repaid. That being the case the statutory presumption under s 3 of the Act had arisen against the lenders. The lender in that two said cases are presumed to be money lenders without any s 5 Moneylending license or exempted by the Minister. On the other hand the defendant in the present case was lawfully exempted by the Minister from the provisions of the Act from 24 May 1983 to 22 May 1991.

Whether the defendants were exempted under s 2(e) of the Moneylenders' Act 1951 by the Minister of Housing & Local Government after 23 May 1991

[10] The plaintiff has attacked the legal capacity on the part of the defendant in the collection of the payment of the loan and the payment of the interest and the late payment charges beyond 22 May 1991. The plaintiff had referred to a letter dated 5 June 1989 from the Ministry to the defendant. This letter exempted the defendant from the Act for two years from 23 May 1989. The second paragraph of the said letter states as follows:

> Kementerian ini juga ingin memaklumkan bahawa pengecualian yang diberi bagi kali yang terakhir. Ini bermakna jika sekiranya syarikat tuan ingin meneruskan perniagaan sebagai pemberipinjam wang ia seharusnya memperolehi lesen pemberipinjam wang daripada pihak berk[redacted] yang berkenaan selepas tamat tempoh pengecualian di atas.

[11] It is the contention of the plaintiff that the defendant did not obtain a moneylenders' license after the expiry of the exemption on 22 May 1991. The defendant therefore cannot carry on moneylending after 22 May 1991. From June 1991 until 31 May 1999 the defendant has been collecting from the plaintiff the principle sum loaned, interest and late payment charges. The total sum collected during this period is RM819,857.56. This was the sum collected when the defendant had no moneylending license and no exemption from the Act. It is submitted for the plaintiff that these collections are illegal under s 15 of the Moneylenders' Act. The plaintiff also contends that the defendant has been collecting interest plus late payment or penalty interest and this, it is submitted is illegal. The definition of interest is given in s 2 of the Act as follows:

> ... any amount by whatsoever name called in excess of the principal paid or payable to a moneylender in consideration of or otherwise in respect of a loan.

[12] Contrary to the contention of the plaintiff, it is my view that it is clear upon a close examination of the said letter dated 5 June 1989 from the Ministry the defendant is only prohibited from engaging in the business of moneylending after the expiry of the exemption period unless a moneylending licensed is obtained by the defendant. Looking at the provision of the old s 2(e) of the Act and the said three letters from the Ministry in its totality, it is my finding that the defendant is not prohibited from collecting the repayment of the loan and payment of agreed interest and late payment charges beyond 22 May 1991 in respect of those loan agreements executed during the exemption period.

[13] The plaintiff had only alleged that a sum of RM819,857.56 was paid by her to the defendant from June 1991 to 31 May 1999 which was after the exemption period and of which plaintiff claimed the defendant is not entitled to receive in law. But the plaintiff had not adduced any viva voce evidence to the effect that the defendant is prohibited from the business of collection beyond the exemption period. No officials from the Ministry were called to testify on her behalf so as to substantiate her contention. In the absence of such evidence it is my finding that the plaintiff's allegation had stood unsubstantiated and hence must fail.

[14] It is to be stated that all the figures as contained in pp 41-61 of AB2 (appendix A and C) are not disputed. It is all along the contention of the defendant that all interest and late payment charges are levied pursuant to the Agreement in which the terms and conditions have been mutually agreed upon in the absence of any vitiating factors.

[15] The learned counsel for the plaintiff had also submitted on s 15 of the Act and that the defendant's collection of interest and late payment charges is illegal. But I find that illegality is never pleaded in the statement of claim. Further no evidence as to 'illegality' was ever adduced. Hence any submission on 'illegality' must not be considered and accepted. What were pleaded were (1) mistake of fact and (2) compulsion and for that the plaintiff had failed to adduce any evidence to substantiate her contention of 'mistake' and 'compulsion'.

Whether the defendant is entitled to charge interest at 14%pa compound interest despite the loan having been secured by a property

[16] I am of the view that the plaintiff is wrong in stating that the defendant, being licensed moneylenders is prohibited from charging interest over and above the rate of 14% as provided for under s 22(1) of the Act. It must be restated here that I have already made a finding that the defendant is not a licensed moneylender within the meaning of s 5 of the Act. The defendant is a corporate body exempted from the provisions of the Act by the Minister pursuant to the old s 2(e) of the Act. The defendant is therefore not bound by the Act and could contract on those interest rates over and above the rates as stipulated in the Act so long as same are mutually agreed upon by both contracting parties.

[17] As regards the case of *Bumiputra Merchant Bankers Bhd v Meng Kuang Properties Bhd* [1991] 1 CLJ 718 cited for the plaintiff I find that it is only an authority on how the bank could capitalise the interest or compound it. It is not an authority to state that exempted body under the old s 2(e) of the Act could not levy compound interest and that only banks could do so. I take the view that the expression 'exemption from the provisions of this Ordinance' has one and only one meaning in that the defendant is exempted from the provisions of the Act in their business of moneylending during the exemption period. Since the defendant is not bound by the Act I find that the submission by counsel for the plaintiff on the application of s 21 of the Act whereby the court shall reopen the

transaction and take account between the moneylender and the person sued and relieve the person sued from any excess sum and order the repayment of excess to the person sued must fail.

[18] With regard to the issue of whether the plaintiff is contractually bound to pay the defendants interest at the rate of 14%pa and default interest at the rate of 18%pa I am of the view that these payments are as agreed by the plaintiff and defendants pursuant to the Loan Agreement. The defendant is entitled to charge default interest at 18%pa as stipulated in cl 5(c) of the Loan Agreement Cum Assignment dated 9 May 1984 between plaintiff and defendant. The case of *Trengganu State Economic Development Corporation v Nadefinco Ltd* [1982] 1 MLJ 365 is the authority whereby the Federal Court had ruled that if interest is agreed to be of yearly or monthly rests, then interest is chargeable on the outstanding sum to be computed on compound interest basis.

[19] The document at p 48 Appendix B of AB2 reveals that the total late payment charges since levied is RM225,179.02. The method of calculation as illustrated in para 9.3 is indeed the proper mode of calculation adopted by the defendant which is contractually agreed upon in that 18%pa on the then arrears of instalments is levied and then computed at compound interest on monthly rests. For example, a sum of RM437.98 was levied for June 1986 being as follows:

Arrears : RM29,604.30

Rate chargeable : 18% per annum on monthly rests

therefore RM29,604.30 x 18/100 x 30/365 = RM437.98

and the defendant is perfectly entitled to do so under the Agreement which is not excessive, harsh and unconscionable. The plaintiff is to be solely blamed for her current predicament in that she should not be late in servicing her instalments from 1 June 1985 to 31 May 1997 (of 11 years) amounting to RM225,179.02 thereby entitling the defendant to levy the contractual late payment charges. At the very least, she should have heeded to the advise of DW1 the witness called for the defendant and applied for re-financing at other banks or finance companies if indeed such rates levied by the defendant are indeed excessive, harsh and unconscionable.

[20] Paragraphs 9 and 10 of the statement of claim of the plaintiff aver that the defendant is not entitled to charge compound interest at 14%pa and late payment charges ('LPC') at 18%pa and that the latter is a penalty. On this point I find that the plaintiff has yet to discharge the burden of proving that notwithstanding the clear wordings of the letter of offer and the Agreement, the defendant is not entitled to levy interest and that the LPC is indeed a penalty. Even if the LPC is a penalty it should not be a ground to nullify the Agreement.

[21] It is to be noted that subsequent to the defendant's letter to the plaintiff dated 9 May 1988 as at p 32 of AB2, the defendant had indeed levied interest at 12.5%pa with yearly rests instead of 14%pa with monthly rests effective 1 May 1988 (refer to p 46 of AB2 (Appendix A – Sch of

Interest Charged by GFC)) and totalling RM511,510.11. Despite the rebate having been given by the defendant to the plaintiff, the plaintiff still contends that the defendant is not entitled to levy such agreed rates and that the computation adopted was wrong and the rates are harsh, excessive and unconscionable. The plaintiff has failed to plead or adduce evidence or submit what is the correct method of computation. The answer is quite obvious in that the plaintiff could not find ways to circumvent on those rates and computation which have since been mutually agreed upon.

[22] As regards the contention of the plaintiff that the prescribed interest, default interest and the manner of calculating are harsh, unconscionable and substantially unfair, I find that there is no evidence adduced by the plaintiff to indicate that the LPC is a penalty. On this point I would like to refer to *Cheshire, Fifoot and Furmston's Law of Contract* at p 1036 wherein it states inter alia that the onus of showing that the specified sum is a penalty lies upon the party who is sued for his recovery. (See the case of *Roboohone Facilities Ltd v Blank* [1996] 1 WLR 1428). The learned counsel for the plaintiff has cited the case of *Realvest Properties Sdn Bhd v The Co-operative Central Bank Ltd (Under Receivership)* [1996] 3 CLJ 823 to support the contention of the plaintiff whereby the Federal Court had held inter alia that the provision for default interest is a stipulated payment in terrorem of the party breaching the contract. I find that the facts in *Realvest Properties Sdn Bhd* can be distinguished from the present case. In the present case the LPC is a genuine pre-estimate of the defendant's loss for breach of contract (in servicing the instalments late) by the plaintiff. On this point it is necessary to quote a passage from the decision of the *Realvest* at p 825 where it is stated as follows:

> In a default such as happened here, there is an established measure of damages payable by a borrower which is damages for loss of use of fund or money. This was due to the fact that the sum in arrears, if it had not been in arrears and had been paid back punctually to the chargee, could have been lent to some other person by the chargee (lender) at certain interest for a period while it was in arrears.

[23] The LPC is levied as from the date of default and not as from the date of the loan documentation: (See the Privy Council case of *Sundar Koer v Raj Sham Kishen* (1906) 34 IA 9). I am of the view that the plaintiff just could not simply fall on s 75 of the Contracts Act 1950 and allege that the LPC is a penalty and hence irrecoverable. The LPC is certainly a liquidated damage which represents a genuine pre-estimate of the defendant's loss and damages arising out of the breach of contract by the plaintiff as borrower. It was by no means exorbitant, harsh or unconscionable but serves as a 'reasonable compensation' to the defendant as illustrated in Illustration (d) of the said s 75 of the Contracts Act. The plaintiff still certainly needs to pay reasonable compensation to the defendant as damages for the loss of use of such arrears of instalments. It is my finding that the plaintiff had failed to discharge the burden of proving that the LPC is a penalty meant to be a stipulated payment in terrorem and hence all submissions on this issue must fail.

A **[24]** Finally, I am of the view that the fact that the plaintiff had been a voluntary party to the Agreement as borrower thereof since 1984 and had been repaying the loan and payment of the interest and late payment charges from 31 July 1987 to 31 May 1999 for close to 12 years the plaintiff should be treated as having waived and abandoned her rights and she is now estopped from:

B

(1) challenging her liability to pay for the agreed interest at 12.5%pa with yearly rests and late payment charges of 18%pa;

(2) challenging the validity of the Agreement;

(3) asking for the refund of the said sum of RM260,940.57 from the C defendant;

(4) asking for those reliefs as stated in paras 15(a) to 15(j) of the statement of claim dated 10 March 2000.

[25] By the plaintiff's execution of the said Agreement in which all the interest rate and late payment charges have been expressly stated in such D clear and unambiguous terms, she had therefore waived and abandoned her rights to challenge (i) the capacity of the defendant as a moneylender and (ii) the said rates by continuing servicing the monthly instalments for a period of close to 12 years from 31 July 1987 to 31 May 1999. There is therefore no valid cause of action by the plaintiff against the defendant or at E all. On this point I would like to quote a passage from the book *Chitty on Contracts* (25th Ed) at para 28 at pp 19-20 wherein inter alia it states as follows:

> A party who executes a deed is estopped in a Court of Law from saying that the facts in the deed are not truly stated ... When a recital is intended to be a F statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. ... First, it applies between the parties to the deed and those claiming through them; secondly, it applies when an action is brought to enforce rights arising out of the deed and not collateral to it; thirdly, it only applies when a statement is clear and unambiguous ... .

Plaintiff's application dismissed with costs.

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Reported by Jeyanthi Mala

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